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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 235

RICHMOND MORTGAGE AND LOAN CORPORATION,
Appellant,

vs.

WACHOVIA BANK & TRUST COMPANY AND ALEXANDER GARRETT JOHNSTON, EXECUTORS OF THE ESTATE OF ROBERT P. JOHNSTON, Deceased.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

APPELLEES' BRIEF.

ROBERT R. WILLIAMS,
S. G. BERNARD,
Counsel for Appellees.

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Appellees.

BRIEF OF APPELLEES ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

Opinion Below.

The opinion of the Supreme Court of North Carolina in this case is printed in full on pages 38 to 41 of the Record; also in 210 North Carolina Reports, pages 29, 32.

Jurisdiction of the Court.

Consideration of jurisdiction was postponed to the hearing of the case on the merits. Appellees submit here a statement of matters making against the jurisdiction of this Court.

The judgment of the Supreme Court of North Carolina dealing particularly with the questions at issue, 210 North Carolina Reports, pages 33, 34 and 35 is as follows:

> "In the instant case, the validity of section 3 of the statute is challenged by the appellant on the ground that its enactment by the General Assembly of this State was in violation of section 10 of Article I of the Constitution of the United States, of the Fifth Amendment, and of section 1 of the Fourteenth Amendment of said Constitution, and was also in violation of sections 7, 17 and 35 of Article I of the Constitution of the State of North Carolina, in that said section impairs the obligation of the contract entered into by and between the plaintiff and the defendant prior to its enactment.
>
> "Section 3 of Chapter 275, Public Laws of North Carolina, 1933, is as follows: 'Sec. 3. When any sale of real estate or personal property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee, or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee, or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor, or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as a matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale, or that the amount bid was substantially less than its true value, and upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part: Provided, this section shall not affect nor apply to the rights of other purchasers or of innocent purchasers, nor shall it be held to affect or defeat the negotiability of any note, bond, or other

obligation secured by such mortgage, deed of trust, or other instrument: Provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court, nor to any judgment sought or rendered in any foreclosure suit, nor to any sale heretofore made and confirmed.' "

"The statute recognizes the obligation of a debtor who has secured the payment of his debt by a mortgage or deed of trust to pay his debt in accordance with his contract, and does not impair such obligation. Nor does the statute hinder, delay, or defeat, in whole or in part, the right of the creditor to enforce such obligation by an action instituted by him against his debtor in a court of competent jurisdiction. There is nothing in the statute which prevents a recovery by the creditor in such action of a judgment for the amount due on the debt. The statute provides only that when the creditor has elected to become the purchaser of the property conveyed by the mortgage or deed of trust at a sale made under a power of sale contained in the mortgage or deed of trust, and thereafter, pursuant to such sale and purchase, acquires title to the property, he shall not recover judgment against his debtor for any deficiency, after the application of the amount of his bid as a payment on the debt, without first accounting to his debtor for the fair value of the property at the time and place of the sale, and that such value shall be determined by the court. In such case, the amount bid by the creditor at the sale, and applied by him as a payment on the debt, is not conclusive as to the value of the property.

"We are of the opinion that the statute is valid, and so hold.

"The statute involved in this action is not 'emergency legislation,' nor is its purpose to provide a 'moratorium' for debtors during a temporary period of depression. For this reason, the cases cited by appellant from other jurisdictions are not applicable in the instant case. The statute recognizes the validity of powers of sale contained in mortgages or deeds of trust,

> but regulates the exercise of such powers by the application of well settled principles of equity. It does not impair the obligation of contracts, but provides for judicial supervision of sales made and conducted by creditors whose debts are secured by mortgages or deeds of trust, and thereby provides protection for debtors whose property has been sold and purchased by their creditors for a sum which was not a fair value of the property at the time of the sale. See Better Plan Building & Loan Asso. *v.* Holden (N. J.) 169 Atl., 289.
>
> "The statute is applicable in the instant case, and supports the judgment of the Superior Court. For that reason the judgment is Affirmed."

While it is true that appellant raised a federal question in the courts below, it was not necessary to decide the federal question in disposing of the case. In fact, the case was decided solely upon a state law, sufficient to support the judgment, and the Federal question was decided only incidentally as the rights of appellants were affected by the judgment.

Specifically the decision of the Supreme Court of North Carolina is made to rest upon this statement of the law:

> "The statute provides only that when the creditor has *elected* to become the purchaser of the property conveyed by the mortgage or deed of trust at a sale made under a power of sale contained in the mortgage or deed of trust, and thereafter, pursuant to such sale and purchase, acquires title to the property, he shall not recover judgment against his debtor for any deficiency, after the application of the amount of his bid as a payment on the debt, without first accounting to his debtor for the fair value of the property at the time and place of the sale, and that such value shall be determined by the court."

It appears, therefore, that the Supreme Court of North Carolina based its judgment upon the doctrine of election

of remedies, an independent ground, not involving a Federal question.

The doctrine of election of remedies obtains in North Carolina.

> "Where a person has presented to him an election of inconsistent remedies, he must, once for all, choose between them, and is bound by his choice so made."
>
> *Hanes* v. *Shapiro,* 168 N. C. 24, 84 S. E. 33.

> "An election once made, with knowledge of the facts, between coexisting remedial rights which are inconsistent, is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit or proceeding based upon a remedial right inconsistent with that asserted by the election, or to the maintenance of a defense founded on such inconsistent right."
>
> *Baker* v. *Edwards & Son,* 176 N. C. 229, 97 S. E. 16, 18.

The State law upon which the Supreme Court of North Carolina bases its decision in the instant case is sufficient to support the judgment.

It is settled law that where the record discloses that the judgment of a State Court was based not alone upon a ground involving a Federal question but also upon another and independent ground broad enough to maintain the judgment, this Court will not take jurisdiction to review such judgment and will dismiss the writ of error brought for that purpose.

People of the State of New York ex rel. Thomas F. Doyle et al. v. *Atwell,* 261 U. S. 590, 592, 67 L. Ed. 814;

Cuyahoga River Power Co. v. *Northern Realty Co.,* 244 U. S. 300, 304, 61 L. Ed. 1153, 1157;

Adams v. *Russell,* 229 U. S. 353, 358, 57 L. Ed. 1224, 1226;

The 134 William Street Co., Inc., v. *Lynch et al.*, 293 U. S. 526;
Ohio ex rel. Eastman Co. v. *Stuart et al.*, 291 U. S. 643.

For the reasons set forth, we respectfully submit that the Supreme Court of the United States is without jurisdiction to hear this case upon appeal and, therefore, appellees' motion to dismiss this case should be allowed.

Appellant's Specifications of Error.

Appellant's Specification of Error #1 (page 8 of the brief) deals with what it terms an unconstitutional application of the statute. We will endeavor to show in our argument in opposition to this Specification of Error that the statute deals solely with a remedy, is a constitutional exercise of legislative power, and does not affect a substantial right of appellant.

Appellant's Specifications of Error Nos. 2, 3 and 4 (pages 8-9 of the brief) are so related that we will discuss them together, and endeavor to show that the judgment of the Supreme Court of North Carolina is fully sustained by the facts and the law of the case.

Summary of Argument.

I.

THE STATUTE IN QUESTION DEALS SOLELY WITH THE REMEDY OF APPELLANT IN ENFORCING ITS RIGHTS UNDER THE DEED OF TRUST, AND IS CONSTITUTIONAL.

Public Laws, N. C., 1933, pages 402 and 403;
Wilson v. *Standefer*, 184 U. S. 399, 416;
Bernheimer v. *Converse*, 206 U. S. 516, 530;
Tennessee v. *Sneed*, 96 U. S. 69, 74;
Oshkosh Water Works Co. v. *Oshkosh*, 187 U. S. 437, 439;

National Surety Co. v. *Architectural Co.*, 226 U. S. 276, 283;
Waggoner v. *Flack*, 188 U. S. 595, 602;
New Orleans, etc., R. Co. v. *Louisiana*, 157 U. S. 219, 224;
Crane v. *Hahlo*, 258 U. S. 142, 147;
Sturges v. *Crowninshield*, 4 Wheat. 122, 200.

II.

THE JUDGMENT OF THE SUPREME COURT OF NORTH CAROLINA AFFIRMING THE JUDGMENTS OF THE SUPERIOR COURT AND GENERAL COUNTY COURTS OF BUNCOMBE COUNTY, IS FULLY SUSTAINED BY THE FACTS AND THE LAW OF THE CASE.

Great Northern Railway Co. v. *Donaldson*, 246 U. S. 121, 124, 62 L. Ed. 616;
Campbell v. *City of Olney*, 262 U. S. 352, 354, 67 L. Ed. 1021;
U. S. v. *Yuen Pak Sune*, 183 Fed. 260, 266, 191 Fed. 825;
Hanes v. *Shapiro*, 168 N. C. 24, 27, 84 S. E. 33;
Baker v. *Edwards & Son*, 176 N. C. 229, 234, 97 S. E. 16;
Adams v. *Spillyards*, 86 A. L. R. 1493, 61 S. W. (2d) 686;
Vanderbilt v. *Brunton Piano Co.*, 89 A. L. R. 1080, 169 Atl. 177.
Newark Savings Institution v. *Forman*, 33 N. J. E. 436;
Langever v. *Miller*, 96 A. L. R. 836; 76 S. W. (2d) 1025.

ARGUMENT.

I.

The statute in question deals solely with the remedy of appellant in enforcing its rights under the deed of trust, and is constitutional.

The statute complained of was enacted by the General Assembly of North Carolina at its legislative session in the year 1933, being Section 3 of Chapter 275 of the Public

Laws of North Carolina for the year 1933, at pages 402 and 403, and is in words and figures as follows:

> "SEC. 3. When any sale of real estate or personal property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and off-set, but not by way of counter-claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or off-set any deficiency judgment against him, either in whole or in part; Provided, this section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust, or other instrument; provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale heretofore made and confirmed."

While appellant contends that the application of the statute to it impairs substantial contractual rights, it admits that the statute operates only on the remedy (Brief, page 22).

The statute does not take from appellant all remedies which it enjoyed for the enforcement of its contract.

After the enactment of the statute, appellant had three courses of procedure open to it:

(1) Appellant could have instituted a suit against the appellees and recovered judgment for the amount due and at the same time asked for and obtained a decree of foreclosure of the deed of trust. Upon a sale of the property, the net amount of the sales prices would have been credited upon the judgment, and if the amount was insufficient to pay the judgment in full, appellant would have had a judgment for any deficiency.

(2) Appellant could have caused a sale of the property to be made by the Trustee under the power of sale contained in the deed of trust, stood by and permitted the property to be sold to someone else, and if the sales price was insufficient to pay the debt in full, appellant could have sued appellees and obtained a judgment for any deficiency.

(3) Appellant could adopt the course of procedure which it did, cause the property to be sold by the Trustee under the power of sale contained in the deed of trust, and itself bid at the sale and become the purchaser thereof. In this event, and only in this event, appellant was required under the above mentioned statute to account to appellees for the fair value of the property at the time of the sale. If it be found that the fair value of the property was then equal to the amount of the debt, appellant could not recover a deficiency, but if it be found that the fair value of the property at that time was less than the amount of the debt, appellant could have recovered judgment against the appellees for the difference between the fair value of the property and the amount of the debt.

Appellant was under no compulsion to bid at the sale and, therefore, voluntarily became the purchaser of the property mentioned in the deed of trust and subjected itself to the provisions of the statute. If the recovery of

a judgment for a deficiency had been an important consideration at the time of the sale, two courses whereby appellant might have obtained a judgment for a deficiency were open to it as above stated. We are strongly inclined to believe that appellant at the time of the sale preferred to take its chances of recovering payment of its debt by purchasing the property and thereafter selling the same at a better price. We are led to this conclusion by reason of the fact that the debt at that time amounted to $7,375.90 (R. 21) and after appellant became the owner of the property, it listed the same for sale with real estate brokers at the price of $12,500.00 (R. 18). A sale of the property by appellant at the above price, less the usual brokers' commissions, would have yielded the appellant the net amount of $11,875.00 in settlement of a debt of $7,375.90; and now, if such a sale could be effected and appellant recover of appellees in this action, appellant would have some $16,000 in settlement of its said claim plus interest.

The power of legislatures of the several states to pass laws affecting the remedy for the enforcement of contacts seems first to have been considered by this Court in the case of *Sturges* v. *Crowninshield*, 4 Wheat. 122, 200, where Chief Justice Marshall stated the rule as follows:

> "The distinction between the obligation of a contract and a remedy given by the legislature to enforce that obligation exists in the nature of things, and without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct."
>
> *Wilson* v. *Standefer*, 184 U. S. 399, 416;
> *Bernheimer* v. *Converse*, 206 U. S. 516, 530.

The rule of law laid down by Chief Justice Marshall has been followed by this Court to the present day.

> "The rule seems to be that in modes of proceeding and of forms to enforce the contract the legislature

has the control, and may enlarge, limit, or alter, provided that it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right."

Tennessee v. *Sneed*, 96 U. S. 69, 74;
Oshkosh Water Works Co. v. *Oshkosh*, 187 U. S. 437, 439;
National Surety Co. v. *Architectural Decorating Co.*, 226 U. S. 276, 283.

By the express provisions of the statute the ancient right of foreclosure through the courts is preserved.

"Provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale heretofore made and confirmed."

Public Laws N. C. 1933, pages 402, 403.

The right of foreclosure through the courts preserves to appellant the authority to obtain for itself every right and advantage which the contract and the law conferred upon it at the time the contract was entered into.

"It is true that the remedy for the enforcement of a contract sometimes enters into the contract itself, but that is where an endeavor has been made to so change the existing remedy that there is no effective and enforceable one left, or the remedy is so far impaired that the party desirous of enforcing the contract is left practically without any efficient means of doing so; but in the case of an alteration of a remedy, if one is left or provided which is fairly sufficient, the obligations of a contract are not impaired, although the remedies existing at the time it was entered into are taken away."

Waggoner v. *Flack*, 188 U. S. 595, 602.

"Modes of procedure in the courts of a State are so far within its control that a particular remedy existing at the time of the making of a contract may be

abrogated altogether without impairing the obligation of a contract if another and equally adequate remedy for the enforcement of that obligation remains or is substituted for the one taken away."

New Orleans, etc., R. Co. v. *Louisiana,* 157 U. S. 219, 224.

"No one has a vested right in any given mode of procedure and so long as a substantial and efficient remedy remains or is provided, due process of law is not denied by a legislative change."

Crane v. *Hahlo,* 258 U. S. 142, 147.

II.

The judgment of the Supreme Court of North Carolina affirming the judgments of the Superior and General County Courts of Buncombe County is fully sustained by the facts and the law of the case.

Appellant's Specifications of Error 2, 3 and 4 (Brief, pages 8-9, are so related that, with the permission of the Court, we will discuss these Specifications of Errors together.

The facts set forth in the record (pp. 10 to 20) amply support the verdict of the jury.

"The trial court held that there was sufficient evidence to sustain the verdict, and refused to disturb it. The Supreme Court of Washington affirmed the judgment. In this situation it is enough to say that it is not the province of this Court to weigh conflicting evidence. The record shows testimony supporting the verdict, and that is as far as this Court enters upon a consideration of that question."

Great Northern Railway Co. v. *Donaldson,* 246 U. S. 121, 124.

While the judgment had the effect of depriving appellant of a right which it had prior to the enactment of the statute

in question, under the facts it did not take away from appellant the right to a judgment for a deficiency under two courses of procedure which were open to it, under either of which appellant could have enforced every right which it claims in this action. The Supreme Court of North Carolina based its decision upon the well-established doctrine of election of remedies, an independent non-Federal question.

> "Unless a Federal right is involved, the State court's application of local laws will not be reviewed here."
> *Campbell* v. *City of Olney*, 262 U. S. 352, 354.

> "Broadly speaking, an election of remedies is the choice by a party to an action of one of two or more coexisting remedial rights where several such rights arise out of the same facts."
> *U. S.* v. *Yuen Pak Sune*, 183 Fed. 260, 266 (affirmed, 191 Fed. 825).

The doctrine of election of remedies obtains in North Carolina:

> "Where a person has presented to him an election of inconsistent remedies, he must, once for all, choose between them, and is bound by his choice so made."
> *Hanes* v. *Shapiro*, 168 N. C. 24, 27, 84 S. E. 33.

> "An election once made, with knowledge of the facts, between coexisting remedial rights which are inconsistent, is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit or proceeding based upon a remedial right inconsistent with that asserted by the election, or to the maintenance of a defense founded on such inconsistent right."
> *Baker* v. *Edwards & Son*, 176 N. C. 229, 234, 97 S. E. 16, 18.

Appellant complains that it should not be put to the expense, trouble and delays attending foreclosure suits in

order to establish its right to a judgment for a deficiency (Brief, page 25).

The answer to appellant's position in this respect is that in order to obtain a judgment for a deficiency, in any event, it had to prosecute a suit, or action at law, against the appellees, and it might as well have instituted a foreclosure suit in the first instance. Appellant's suggestion, that foreclosure suits are attended with delays, relates more particularly to suits in which the mortgagors have obtained injunctions because of some equitable right belonging to or claimed by the debtor. Our experience leads us to believe that no such delays as appellant complains of attend foreclosure suits by mortgagees, because the institution of such suits usually preclude injunctive relief in favor of mortgagors. Further, if appellant refrained from instituting a foreclosure suit because of anticipated obstacles to a speedy termination thereof, this would in itself constitute a reason for requiring such procedure, because it assumes that equities exist in favor of the mortgagor, the solution of which would require time. Moreover, if the prosecution of a foreclosure suit had been attended with all the delays and difficulties suggested by appellant and, therefore, objectionable on that ground, it could have allowed someone else to become the purchaser at the sale, and in the event of a deficiency, could have instituted an action therefor and the procedure for the collection of a deficiency would have been precisely the same as appellant followed in the instant case, with no more delays and at no greater cost.

We do not agree that the following cases cited in appellant's brief support its contentions, for that:

The statute construed by the Supreme Court of Arkansas in the case of *Adams* v. *Spillyards,* 86 A. L. R. 1493, 61 S. W. (2d) 686, provides, among other things, that:

> "SECTION 1. In any foreclosure, in any court in the State of Arkansas in which real estate is involved,

> the real estate securing the loan sought to be foreclosed, shall be considered to be the value of the loan made, irrespective of the amount which may be realized from the sale of such real property."

The statute under investigation by the Supreme Court of Arkansas, arbitrarily fixed the value of the security at the amount of the debt, without any regard to the real, fair, or market value thereof. We do not regard this case as being in point here.

The statute construed by the New Jersey Court of Errors and Appeals in the case of *Vanderbilt* v. *Brunton Piano Company,* 89 A. L. R. 1080, 169 Atl. 177, is not printed in the report of the case available to appellees, but we assume from a statement appearing in the opinion that the statute set up the fair market value of the security standing alone as a self-sufficient, resistless fact in reduction of an otherwise collectible debt.

That is not the case here in several respects. Under the North Carolina statute there are two courses of procedure whereby appellant could recover judgment for a deficiency, the difference between the amount of the debt and the amount for which the property might be sold, *i. e.*, a sale under the power of sale contained in the deed of trust to any person other than appellant, and a sale at foreclosure under decree to any one, including appellant.

While the New Jersey court, in the case of *Vanderbilt* v. *Brunton Piano Company, supra,* held the statute there in question unconstitutional, it quoted with apparent approval from the case of *Newark Savings Institution* v. *Forman,* 33 N. J. E. 436, as follows:

> "The act under consideration leaves the complainant a substantial remedy of the same kind as that taken away, according to the course of justice, as it existed when the contract was made, a remedy which is not only of the same sort, but is even more effica-

cious than that which is taken away. It has only taken away one of two remedies of a like character, one at law and the other in equity, and that is no contravention of the complainant's constitutional right."

Upon a careful examination of the opinion in the above case, we are persuaded to believe the New Jersey court would have sustained a statute similar to the one here in question.

The statute construed by the Supreme Court of Texas in the case of *Langever* v. *Miller*, 96 A. L. R. 836, 76 S. W. (2d) 1025, is not in point here, for the reason that appellant could have had a judgment for a deficiency in North Carolina since the passage of the statute if it had elected to prosecute a foreclosure suit. Moreover, the Texas statute seems to resemble the New Jersey statute more nearly than that of North Carolina. It would seem that the procedure followed in the Texas case is the only procedure available to mortgagees, whereas even now there are three methods of procedure available to beneficiaries under deeds of trust in North Carolina for the enforcement of their contracts.

III.

The judgment of the Supreme Court of North Carolina should be sustained.

Respectfully submitted,

ROBERT R. WILLIAMS,
Counsel for Appellees.
S. G. BERNARD,
Of Counsel for Appellees.

Service of the foregoing brief accepted and receipt of a copy thereof is hereby acknowledged, this the 3rd day of November, 1936.

KESH & WALTON,
Counsel for Appellant.